2012

Deconstructing CRAC: Teaching Proposed Findings of Fact and Conclusions of Law in a Legal-Writing Program

Larry Howell
Alexander Blewett III School of Law at the University of Montana, larry.howell@umontana.edu

Deconstructing CRAC: Teaching Proposed Findings of Fact and Conclusions of Law in a Legal-Writing Program

Larry Howell

> *The difference between a decision and findings of fact and conclusions of law is one in form only. Unlike a decision [that a judge] may render in another case, the factual findings are required to be separate from the conclusions of law. There must be a deliberate separation of these from one another.*[1]

> *What is deconstructed food?*
>
> *A: It's taking the parts of a dish and separating the individual components into a new usage. The pieces should be recognizable by themselves but when eaten together should bring about the idea of the original dish. Think the whole is the sum of its parts.*[2]

Recently, legal-writing programs were identified as a bright spot in two otherwise critical examinations of the American legal-education system, and especially its stolid reliance on the case-dialogue, or Socratic, method of teaching.

---

[1] Joyce J. George, *Judicial Opinion Writing Handbook* 198 (5th ed., Hein 2007).

[2] Answers, *What is deconstructed food?* http://wiki.answers.com/Q/What_is_deconstructed_food (last accessed July 1, 2012).

Educating Lawyers: Preparation for the Profession of Law, a much-discussed 2007 study by the Carnegie Foundation for the Advancement of Teaching, criticized law schools for their inadequate attention to actual law practice:

> Unlike other professional education, . . . legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner . . . .[3]

But the study also singled out legal-writing classes as an exception. After noting that its researchers were "impressed" with the comments that many law students made about the effectiveness of their writing classes, the Carnegie Foundation concluded: "The legal writing courses the students were describing provide a pedagogical experience that . . . is missing in the case-dialogue classes that make up most of the students' first year."[4]

The second widely read report, *Best Practices for Legal Education*,[5] was even more blunt: "Most law school graduates are not sufficiently competent to provide legal services to clients or *even to perform the work expected of them in large firms.*"[6] But *Best Practices* again praised legal-writing courses for focusing on "context-based instruction" aimed at teaching students to solve concrete legal problems.[7] In addition to developing students' writing skills,

---

[3] William M. Sullivan et al., *Educating Lawyers: Preparation for the Profession of Law* 188 (Jossey–Bass 2007).

[4] *Id.* at 104.

[5] Roy Stuckey et al., *Best Practices for Legal Education: A Vision and a Road Map* (Clinical Legal Ed. Ass'n 2007).

[6] *Id.* at 26 (emphasis added).

[7] *Id.* at 148.

legal-writing classes "also aid the students' understanding of theory and doctrine, sharpen their analytical skills, improve their understanding of the legal profession, and in some instances cultivate their practical wisdom."[8]

This recognition in *Educating Lawyers* and *Best Practices* is well deserved. Unlike much of legal education, legal-writing programs have not continued to teach their subject as it was taught in the middle of the last century. Instead, over the last few decades the pedagogy of legal writing has been transformed by incorporating composition theory, through which "students learn primarily by being led, coached, and given abundant feedback directed to improving their ability to practice legal reasoning in specific contexts."[9]

The praise in both reports, however, does not mean that legal-writing programs are doing all they should to prepare students for practice. *Best Practices* identified a significant weakness in the writing curriculum at most law schools: the failure to teach students how to draft documents other than memos and briefs.

> Unfortunately, law schools have not created comprehensive programs for teaching students how to produce the documents that lawyers typically use in practice. Law schools should determine what types of legal documents their graduates will be expected to produce when they begin law practice and provide instruction in how to produce such documents. After all, it does no good to teach a student to think like a lawyer if the student cannot convey that thinking in writing.[10]

Perhaps the best illustration of that shortcoming is the surprising fact that almost no law schools teach students to draft proposed

---

[8] *Id.* at 148–49.

[9] Sullivan et al., *supra* n. 3, at 108.

[10] Stuckey et al., *supra* n. 5, at 149.

findings of fact and conclusions of law — which state and federal trial judges routinely ask for before or after bench trials to help them decide cases.[11] Court rules in some jurisdictions even mandate that attorneys submit proposed findings before trial and authorize substantial penalties for not complying.[12]

Proposed findings are important not only because they help the judge understand the lawyer's case but also because they help the lawyer understand it. Drafting them forces a lawyer to assess strengths and weaknesses, find the governing law for each contested issue, and identify every significant piece of evidence needed to prove each issue. In short, they become a detailed outline of the lawyer's entire case, factually and legally. That a trial judge is free to adopt one party's proposed findings verbatim only underscores this document's importance. Although verbatim adoption is understandably discouraged by many appellate courts,[13] the Supreme Court has tacitly authorized the practice: "Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence."[14]

Yet, again, very few legal-writing programs teach their students how to prepare this common and crucial document. In fact, my

---

[11] *See In re Las Colinas, Inc.*, 426 F.2d 1005, 1008 (1st Cir. 1970) ("The practice of inviting counsel to submit proposed findings of fact and conclusions of law is well established as a valuable aid to decision making.").

[12] *See, e.g.*, Mont. Unif. Dist. Ct. R. 8 ("In all matters where the court must enter findings of fact and conclusions of law pursuant to Rule 52, M.R. Civ. P., all parties shall file with the court, and serve upon all opposing parties, at least seven days prior to the scheduled trial or hearing, proposed findings of fact and conclusions of law. Failure to file proposed findings of fact and conclusions of law in a timely manner shall be cause for appropriate sanction . . . .").

[13] Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* vol. 9C, § 2578, 320–21 (3d ed., Thomson West 2008).

[14] *U.S. v. El Paso Nat. Gas*, 376 U.S. 651, 656 (1964).

queries in 2010 on the Association of Legal Writing Directors' listserv did not identify any law school besides the University of Montana that makes it part of the required legal-writing courses. The likely reason is that there's little information on the subject. How to prepare findings is not discussed in any law-review article or even in the more comprehensive legal-writing texts. Until now, the only drafting information has been scattered among various practitioner publications and is cursory at best.[15]

An Overview of Judicial Findings and Conclusions: Don't Bother Us with Details

Appellate judges recognize that preparing findings of fact and conclusions of law is important and difficult:

> It is sometimes said that the requirement that the trial judge file findings of fact is for the convenience of the upper courts. While it does serve that end, it has a far more important purpose — that of evoking care on the part of the trial judge in ascertaining the facts. For, as every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty .... And it is not a light responsibility since, unless his findings are "clearly erroneous," no upper court may disturb them. To ascertain the facts is not a mechanical act. It is a difficult art, not a science. It involves skill and judgment.[16]

Under Federal Rule of Civil Procedure 52, a trial judge is required to prepare formal findings of fact and separate conclusions

---

[15] *See, e.g.*, Thomas A. Mauet, *Bench Trials*, 28 Litig. 13, 19 (Summer 2002); Daniel P. Dain & John Kenneth Felter, *Preparing for Civil Trial in Massachusetts* § 2.14 (Mass. C.L.E., Inc. 2009).

[16] *U.S. v. Forness*, 125 F.2d 928, 942–43 (2d Cir. 1942) (citation omitted).

of law whenever the judge serves as trier of fact in a civil case.[17] Rule 52 also extends that obligation to decisions granting or denying temporary injunctions.[18] The list of civil actions in which trial judges sit as triers of fact and thus have to prepare findings is extensive. They include bankruptcy, copyright, patent, condemnation, forfeiture, admiralty, naturalization, and habeas proceedings,[19] as well as claims brought against the United States under the Federal Tort Claims Act.[20] Many states have rules comparable to Rule 52.[21] And a state bench trial is common in cases involving probate, guardianship, divorce and child custody, adoption and parental termination, and workers' compensation.

Requiring a judge to issue findings and conclusions serves three important purposes: (1) giving an appellate court a clear understanding of the basis for the trial court's decision;[22] (2) providing a precise record of what the court decided for purposes of res judicata and collateral estoppel;[23] and (3) ensuring that the court exercises care in determining the facts and applying the law to them.[24] As the Supreme Court has noted, judges "will give more careful consideration

---

[17] Fed. R. Civ. P. 52(a)(1) ("In an action tried on the facts without a jury or with an advisory jury, the court must find the facts specially and state its conclusions of law separately.").

[18] Fed. R. Civ. P. 52(a)(2).

[19] Wright & Miller, *supra* n. 13, § 2573, at 234–44.

[20] 28 U.S.C. § 2402 (2006).

[21] *See* John B. Oakley & Arthur F. Coon, *The Federal Rules in State Courts: A Survey of State Court Systems of Civil Procedure*, 61 Wash. L. Rev. 1367, 1425 (1986) ("[R]eplicas of the Federal Rules are by far the most common procedural system among the state courts.").

[22] Wright & Miller, *supra* n. 13, § 2571, at 219.

[23] *Id.* at 219–20.

[24] *Id.* at 222.

to the problem if they are required to state not only the end result of their inquiry, but the process by which they reached it."[25]

At the same time, because findings of fact are almost always reviewed under a "clearly erroneous" standard,[26] the amount of explanation judges have to provide is fairly minimal and aimed only at justifying their decision under that deferential standard, rather than persuading the reviewing court that the decision is correct.[27] The Advisory Committee Note to the 1948 amendment to Rule 52(a) explained that "the judge need only make brief, definite, pertinent findings," and that judges should avoid "over-elaboration of detail or particularization of facts."[28]

As a result, appellate courts "liberally" construe findings to support a trial-court judgment, "even if the findings are not as explicit or detailed as might be desired."[29] This deference is so great that even if a judge completely omitted an important finding, an

---

[25] *U.S. v. Merz*, 376 U.S. 192, 199 (1964).

[26] Fed. R. Civ. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."); *see also* Wright & Miller, *supra* n. 13, § 2588, at 443 (noting that although Rule 52 is silent on the standard of review for conclusions of law, appellate courts universally agree that they are reviewed under a de novo standard).

[27] *See U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) ("A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.").

[28] Wright & Miller, *supra* n. 13, § 2579, at 331 n. 11.

[29] *In re Fordu*, 201 F.3d 693, 710 (6th Cir. 1999).

appellate court will often apply the doctrine of "implied findings" and hold that the missing finding was in fact found.[30]

This highly deferential standard of review has led to inconsistent court opinions over the years on whether trial-court findings should even mention the evidence that supports the "ultimate" findings on each issue. An ultimate finding of fact is one "deduced from the evidence and is used to resolve the case."[31]

Many opinions from the middle of the last century agreed with the Eighth Circuit's view, expressed shortly after Rule 52 was adopted, that "[f]indings of fact should be 'a clear and concise statement of the ultimate facts, and not a statement, report, or recapitulation of evidence from which such facts may be found or inferred.'"[32] The Second Circuit similarly noted that findings "should not state the evidence or any of the reasoning upon the evidence."[33] And the Ninth Circuit rejected a challenge to the sufficiency of the trial court's ultimate finding that the defendant had not committed fraud, holding rather remarkably that "it would have been *improper* for the court to recite the evidence which had led it to the conclusion."[34]

---

[30] *See, e.g., Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 793 (6th Cir. 1984) ("If, from the facts found, other facts may be inferred which will support the judgment, such inferences should be deemed to have been drawn by the District Court.").

[31] George, *supra* n. 1, at 191 (also stating that "[s]uch a fact is the substantiation for the application of the legal principle chosen").

[32] *Brown Paper Mill Co. v. Irvin*, 134 F.2d 337, 338 (8th Cir. 1943) (citation omitted).

[33] *Peterson Lighterage & Towing Corp. v. N.Y. Central R.R.*, 126 F.2d 992, 996 (2d Cir. 1942).

[34] *Lange v. Liberty Nat'l Ins. Co.*, 324 F.2d 237, 241 (9th Cir. 1963) (emphasis added).

Even though holdings like these were widespread, they are difficult to reconcile with U.S. Supreme Court precedent.[35] In the same year as the Eighth Circuit case cited above, the Supreme Court criticized the lack of detail in a trial court's findings, stating that they contained only "the most general conclusions of ultimate fact. It is impossible to tell from them upon what underlying facts the court relied . . . ."[36] According to commentators, the Supreme Court has unmistakably indicated that "findings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue."[37]

Today, appellate courts are much more likely to insist that findings include sufficient factual support. A Second Circuit opinion written by Justice Sonia Sotomayor before she was elevated to the Supreme Court held that "[c]ourts are not required to provide lengthy analyses in support of their . . . findings but they are required under Fed. R. Civ. P. 52(a) to 'adequately explain the subsidiary facts and methodology underlying the ultimate finding.'"[38] This is also the approach recommended in the *Judicial Opinion Writing Handbook*, which states that judicial findings should "set out express findings of fact showing how the judge reasoned from the evidentiary facts to the ultimate fact."[39]

---

[35] *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943); *Schneiderman v. U.S.*, 320 U.S. 118, 129–30 (1943).

[36] *Schneiderman*, 320 U.S. at 129–30.

[37] Wright & Miller, *supra* n. 13, § 2579, at 328.

[38] *Henry v. Champlain Enterprises, Inc.*, 445 F.3d 610, 622 (2d Cir. 2006) (citation omitted).

[39] George, *supra* n. 1, at 195.

Proposed Findings and Conclusions: For Attorneys, the Devil Is in the Details

Deciding how much detail to include in proposed findings is just one of the attorney's challenges. Unlike the judge's findings, the attorney's must persuade rather than merely decide — but do so in the judge's neutral voice. And there's another difference: whereas a judge's findings receive considerable deference from an audience of appellate judges, an attorney's proposed findings are viewed with professional skepticism by their audience, which also happens to be the person whose views the findings purport to represent.

Thus, the attorney has the harder job. Even under the less deferential approach of today's appellate judges, trial courts still need to include only a bare minimum of subsidiary evidentiary findings to have their ultimate findings affirmed under the clearly-erroneous standard. But if an attorney's proposed findings include only that same bare minimum, they are unlikely to persuade the trial court to adopt their substance, much less their wording. So proposed findings have to be detailed enough to convince. Yet they should not be so detailed that they deviate from the expected brevity inherent in the document's format, which is more akin to a list than a brief. Otherwise, the judge may discount the proposed findings as the oversold product of an overzealous advocate.

The task of persuading the judge is all the more difficult because the findings of fact have to be stated separately from the conclusions of law.[40] Contrast what the writer does in a brief. Brief-writing is all about synthesis:

> With rare exceptions, good legal analysis involves full development of the legal significance of the facts. . . . The argument joins

[40] Fed. R. Civ. P. 52(a)(1).

> the facts and the law, showing how both compel a favorable result. You have to *use* the facts in the argument to achieve a persuasive impact.[41]

But having to separate proposed findings from proposed conclusions makes it practically, if not literally, impossible to fully develop the facts' legal significance. Therefore, to persuade, proposed findings of fact must be stated in a way that makes their significance *implicitly* clear once the reader reaches the proposed conclusions of law.

Similarly, the judge's conclusions of law are likely to be much less detailed than a persuasive set proposed by an attorney. The *Judicial Opinion Writing Handbook*, the most comprehensive secondary source on the subject, actually discourages judges from including general principles of law in their conclusions. Instead, every conclusion "should be tailored to the particular facts and applied specifically."[42] As an example, the *Handbook* states that a judge in a slip-and-fall case should not include the general governing legal principle that "[a] failure to use ordinary care in descending a stairway is negligence," but should state only the conclusions that resolve the legal issue at hand. In the same slip-and-fall example, the *Handbook* recommends this conclusion: "The plaintiff failed to use ordinary care by reading a book while she was descending the stairs. Her fall was the result of her own negligence."[43]

While that advice may be sound for a trial judge, an attorney who followed it in drafting proposed conclusions of law would disregard a widely accepted principle: "readers are more persuaded

---

[41] Michael R. Fontham, Michael Vitiello & David W. Miller, *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* § 2.9, 45 (2d ed., Aspen 2007) (emphasis in original).

[42] George, *supra* n. 1, at 239.

[43] *Id.*

by ideas they have first thought of themselves than by an idea first asserted by another. *This is especially true when the reader knows that the person doing the asserting is an advocate with an admitted persuasive agenda.*"[44] That's why, under the CRAC (Conclusion, Rule, Application, Conclusion) paradigm for persuasive brief-writing, the argument section should fully explain the law governing an issue before applying the law to the facts. The strategy is to have what one legal-writing text calls the reader's "Commentator" apply each legal point to the facts that the reader remembers from the statement of facts, thus "lead[ing] the reader to the desired conclusions about rule application *before the writer asserts those conclusions.*"[45]

Yet if a lawyer's proposed conclusions of law followed the *Handbook*'s advice to state only the final legal conclusion on each issue, the conclusions would simply assert the desired result without giving the judge a chance to independently apply the general legal principle to the findings. Instead, to take advantage of the trial judge's Commentator, proposed conclusions should do precisely what the *Handbook* states judicial conclusions should not: state the general relevant rules without reference to the facts, and then move on to the specific conclusions where the rules are briefly applied to the ultimate findings of fact — and perhaps to some subsidiary evidentiary findings as well.

Deconstructed CRAC: Now We're Cooking

Drafting proposed findings and conclusions can become an exercise in deconstruction. At Montana, student writers must take

---

[44] Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 304–05 (5th ed., Aspen 2010) (emphasis added).

[45] *Id.* at 305 (emphasis in original).

apart their persuasive summary-judgment brief and strive for the same effect in a completely different and purportedly neutral format. The exercise is surprisingly similar to the current high-cuisine trend of deconstructed food, in which classic dishes are prepared and presented in striking new ways:

> At heart, any deconstructed dish should contain all the classic components found in the "original." The difference is in the preparation. When creating a dish utilizing deconstructive techniques, the ingredients are essentially prepared and treated on their own. It is during the plating and presentation stages that everything is brought together.[46]

One of the simpler examples of a deconstructed classic dish is the Caesar-salad recipe published on *The Atlantic* magazine's website not long ago.[47] Whole leaves from the heart of a head of romaine lettuce are drizzled with a sauce made from olive oil, garlic, lemon juice, and anchovies; topped with shavings of Parmigiano Reggiano cheese; and accompanied by toasted baguette slices brushed with olive oil, rubbed with garlic, and sprinkled with salt.[48] The finished product, intended to be eaten with the fingers, contains all the key ingredients found in a classic Caesar salad, but its appearance and textures are very different. Done well, a deconstructed recipe captures the essence of the original dish despite the changes in appearance and texture and even flavor.

---

[46] Foodie Buddha, *The Art of Deconstructed Food*, http://www.foodiebuddha.com/2009/01/21/the-art-of-deconstructed-food/ (Jan. 21, 2009).

[47] Sally Schneider, *Recipe: Deconstructed Caesar Salad*, Atlantic, http://www.theatlantic.com/health/archive/2009/07/recipe-deconstructed-caesar-salad/21745/ (July 22, 2009).

[48] Sally Schneider, *Caesar Salad as It's Meant to Be*, Atlantic, http://www.theatlantic.com/health/archive/2009/07/caesar-salad-as-its-meant-to-be/21735/ (July 22, 2009).

Similarly, proposed findings and conclusions should capture the essence of a well-written brief. Even though the document does not follow CRAC, lacks an argument section or even detailed analysis, and is written in the trial judge's voice, it should still retain its persuasive essence through a logical progression to ultimate findings and conclusions.

The main benefit to students — and to attorneys, for that matter — comes from the act of deconstruction, which forces writers to think about the whole brief as the sum of its parts. Just as the deconstructed Caesar recipe required its creator to understand the interplay of the separate ingredients, drafting proposed findings and conclusions requires writers to understand the interplay between the facts and the law in a way that a brief does not.

A look at creating a more complicated deconstructed recipe, Black Forest Cake,[49] illustrates the analytical process. Each component of the recipe — the chocolate minicakes, the cherry compote, the little pots of fudge — requires both its own individual preparation and continued focus on the goal of capturing the dessert's overall essence. Then the final presentation requires considering how to present the individual parts to create the most striking whole — in this case by adding a separate dollop of whipped cream and a cordial glass of cherry brandy to the plate containing the other components.

That process parallels the process that writers follow in drafting proposed findings and conclusions. They begin by identifying and separating the different components of their brief, such as evidentiary facts, ultimate facts, general rules, and subrules. From those components, they draft each type of finding and conclusion separately, all the while keeping in mind that the overall goal is to capture

[49] Epicurious, *Deconstructed Black Forest Cake*, http://www.epicurious.com/recipes/food/views/Deconstructed-Black-Forest-Cake-231450 (Jan. 2005).

the essence of their brief. Finally, they have to consider how to present the individual components, through thoughtful phrasing and organization, to create the most effective whole.

Categories of Findings and Conclusions

To deconstruct CRAC, one must first identify the different parts. That means labeling the different factual and legal components in CRAC, as well as the additional types of findings contained in the procedural-history and statement-of-facts sections of the brief. Except for "ultimate" and "evidentiary" findings, the labels below are not terms of art discussed in cases or secondary sources. Each type is illustrated by examples from the sample set of proposed findings and conclusions in the Appendix. The sample, based on student efforts, concerns a claim of common-law marriage asserted during probate proceedings to determine who should be the personal representative of the alleged husband's estate.

Types of Findings of Fact

Jurisdictional finding. This is usually a single finding that identifies whatever fact is necessary to establish subject-matter jurisdiction. The finding is usually not too important in state trial courts of general jurisdiction, but in federal courts it's fundamental since their jurisdiction is limited by statute.[50] Jurisdiction in the probate sample is based on the decedent's domicile, so the jurisdictional finding simply states:

> 1. Decedent James (Jim) McAllister was domiciled in Missoula, Montana, at the time of his death on February 14, 2010.

[50] Fontham, Vitiello & Miller, *supra* n. 41, at 321.

Procedural and background findings. Although the *Judicial Opinion Writing Handbook* recommends including procedural history and a short statement of undisputed facts in an introductory section rather than in the findings,[51] I prefer to include a section of procedural and background findings instead. Even though these findings should not be in dispute and therefore do not actually need to be "found" by the court, including them in the proposed findings has no disadvantage and at least two advantages. First, it allows the judge to become comfortable with the attorney's writing in the judge's own voice before getting to the disputed findings. Second, and more important, it allows the attorney to begin subtly structuring the narrative for persuasion through emphasis and placement, just as in a brief's statement of facts. For instance, the last procedural finding in the sample simply states the arguments on which the purported wife, Tracy, based her claim of a valid common-law marriage with the decedent, Jim:

> 6. Tracy argued that the death of Jim's first wife, Diane, removed the impediment to a lawful common-law marriage between Tracy and Jim. Tracy also argued that, after mutually consenting to marry by exchanging vows, she and Jim cohabited because Jim's permanent residence remained her house in Missoula, despite his extensive absence for business. Finally, Tracy argued that she and Jim had begun to establish their reputation as a married couple among their friends before his untimely death.

By ending this section with that proposed finding, the writer has provided the judge with an early road map of where the evidentiary and ultimate findings will lead, element by element, much the way an umbrella section does at the beginning of a brief's argument

---

[51] George, *supra* n. 1, at 203.

section.[52] But because the map is phrased neutrally — labeled as Tracy's argument — the reader is more likely to appreciate the guidance rather than resist the advocacy. And because this procedural finding introduces the four elements of a common-law marriage — competence, consent, cohabitation, and repute — it also allows the writer to use those elements as topical headings for different groups of findings.

After the proposed procedural findings come the general background findings, which begin the actual factual narrative. These also should subtly persuade through emphasis and selection without appearing to be advocacy. In the sample findings, the fact that the decedent, Jim, undoubtedly knew he was still married when he attempted to enter a common-law marriage with Tracy is a damaging — but not legally fatal — fact that Tracy's lawyer needs to confront and minimize. So the first background finding addresses that fact head-on, but also puts it in a less damaging context by noting the fleeting nature of the first marriage:

> 7. Jim and Diane McAllister were married in Boulder, Colorado, on July 17, 1984. Soon after, they separated and never communicated again.

Evidentiary findings. As noted earlier, including detailed evidentiary findings is one of the main differences between a persuasive set of proposed findings and the typical bare-bones findings prepared by a trial judge. Relevant evidentiary findings provide the crucial support for the ultimate findings that the advocate wants adopted on each legal issue. Without them, the proposed findings are just a list of assertions. They should provide the same "narrative reasoning" as a persuasive statement of facts in a brief: "You want to tell a story through a succession of narrated events, building facts upon

---

[52] *See* Edwards, *supra* n. 44, at 301–02.

other facts, choosing their order of presentation and your vocabulary intentionally and strategically, such that your presentation clearly adds up to the conclusion that you want your reader to reach."[53] For example, on the key element of consent, the sample includes the following detailed evidentiary findings to show why the judge should find that Jim intended to marry Tracy under the common law even though he knew he was still married to another woman:

> 21. On December 5, 2009, Jim consulted his attorney, Paul Metzler, about the possibility of marrying Tracy under the common law. Jim had read about a woman who received survivor benefits when her common-law husband died in the World Trade Center attacks.
>
> 22. On December 8, Metzler advised Jim that, to be married under the common law in Montana, he and Tracy simply had to agree to marry and then live together as husband and wife.
>
> 23. Jim then asked Metzler whether a second marriage is valid if a first marriage had not been dissolved, and whether the second could ever become valid. Metzler did not know and said he would research the issue.
>
> 24. On December 14, Metzler left a voicemail message on Jim's phone explaining that under Montana law, a second, bigamous marriage automatically becomes valid if the first marriage ends.

These evidentiary findings, although phrased neutrally, inexorably lead the reader to the ultimate finding that Jim knew what he was doing when he agreed to marry Tracy under the common law, even though he also knew he could not legally marry her. Without them, the writer would be asking the trial judge to accept, without

---

[53] Michael D. Murray & Christy Hallam DeSanctis, *Advanced Legal Writing and Oral Advocacy: Trials, Appeals, and Moot Court* 30 (Found. Press 2009).

support, the counterintuitive assertion that Jim's exchange of informal vows was sincere when Jim knew the law did not recognize bigamous marriages. An appellate court might accept that unsupported ultimate finding by a trial judge, but a trial judge is unlikely to show the same deference to an advocate.

Ultimate findings. An ultimate finding makes the outcome of an issue certain under the applicable legal rules, once the conclusions of law identify them. An ultimate finding can often seem like a conclusion of law.[54] For instance, in common-law marriage cases, consent is an element, but *consent* also has an ordinary nonlegal meaning. Take the statement that "Jim and Tracy consented to marry when they exchanged informal vows promising to take each other as husband and wife." That could serve as both an ultimate finding and a conclusion of law.

To avoid the appearance of reaching a legal conclusion in the findings, a better ultimate finding would sidestep the word *consented* and substitute a near-synonym, such as *agreed* or *intended*, that is not a legal term of art and is not found in the applicable rule. This technique is especially effective when coupled with a brief recap of the key supporting evidence:

> 28. Jim and Tracy intended to enter a common-law marriage when they explicitly exchanged vows to be one another's spouse. Their intent to marry is further shown by Jim's conversations with his lawyer on how to enter a valid common-law marriage, his gift to Tracy of an expensive car titled in both their names, and the dedication to her in his book.

Once that ultimate finding is made, no doubt remains that the element of mutual consent will be satisfied under the rules that will be identified in the conclusions of law. And by recapping the key

---

[54] George, *supra* n. 1, at 189.

evidence, which earlier evidentiary findings detailed, the ultimate finding reminds the reader of those favorable facts.

Types of Conclusions of Law

A noteworthy aspect of a good set of proposed conclusions is what's left out. Under the CRAC pattern for an argument in a brief, the analysis must persuasively explain the rules governing each issue, often through a thorough discussion of the relevant facts in key cases.[55] Yet a set of conclusions of law will rarely explain applicable legal rules and authorities; rather, conclusions should simply state the law and then apply it to the findings. The purpose of proposed findings and conclusions is to resolve a factual dispute, not a legal one. So similarities or differences between prior cases and the case at hand are generally not relevant. If a dispute over the controlling law existed, it should have been resolved through briefing before the trial — and certainly before the findings and conclusions are written.

Jurisdictional conclusion. This conclusion identifies the court's legal basis for deciding the matter. As with jurisdictional findings of fact, in state trial courts of general jurisdiction it's generally a formality and might not be accompanied by a citation. But in federal court, the precise statutory basis must be identified:

> 1. This Court has jurisdiction over this matter because the decedent, Jim McAllister, was domiciled in Montana at the time of his death. Mont. Code Ann. § 72-3-111 (2009).

General-rule conclusions. These conclusions identify the general principles of law that control the resolution of the overall case, as opposed to subrules that apply only to the resolution of a discrete

---

[55] Edwards, *supra* n. 44, at 304–05.

legal issue or element. These general rules are the same ones that would be stated in a brief's umbrella section at the beginning of the argument, and they serve the same function of "provid[ing] the judge with the context for the heart of the argument to follow."[56] Besides stating the broad rules governing common-law marriage in our sample, the general conclusions should also include favorable statements of policy:

> 3. Montana recognizes common-law marriage as valid. Mont. Code Ann. § 40-1-403.
>
> 4. Public policy favors the finding of a valid marriage. *In re Estate of Hunsaker* [citation omitted here; compare the Appendix]. The law presumes that a man and woman portraying themselves as husband and wife have entered into a legal marriage, § 26-1-602(30), and this presumption is "one of the strongest known to law," *In re Swanner-Renner* [citation omitted].
>
> 5. To prove a common-law marriage, the party asserting it must show the following: (1) the parties were competent to marry; (2) they assumed marriage by mutual consent; and (3) they confirmed their marriage by cohabitation and public repute. *Hunsaker* [citation omitted].
>
> 6. The party asserting the common-law marriage need not prove that all the elements were satisfied instantly, but only that all coexisted at some time. *Swanner-Renner* [citation omitted].

Subrule conclusions. These conclusions identify all the necessary and useful subrules that the judge should consider to resolve specific issues or elements. Although the *Judicial Opinion Writing Handbook* discourages judges from including rules in their conclusions of law without simultaneously applying them to the case at hand,[57] proposed conclusions are more persuasive if they first

[56] *Id.* at 302.

[57] George, *supra* n. 1, at 239.

state the subrules before applying them. Again, this allows the judge's Commentator to begin applying the subrules before the writer does — thus leading the judge to nod in agreement when the application conclusions that follow mirror the judge's tentative analysis.[58] That's the essence of persuasion under CRAC, and it also works in this document even though the connections cannot be made as explicitly. For maximum benefit, the subrules, while appearing neutral, should be phrased to make the application implicit:

> 7. A party lacks capacity to consent to a prohibited marriage. § 40-1-402. Montana prohibits marriages entered into before an earlier marriage is dissolved. § 40-1-401(1)(a).
>
> 8. Parties to a prohibited marriage who cohabit after the removal of the impediment to their marriage become legally married on the date the impediment is removed. § 40-1-401(2).
>
> 9. An unlawful bigamous marriage ripens into a valid marriage when the impediment of the first marriage ends, whether through divorce or the death of the original spouse. *In re Estate of Schanbacher* [citation omitted].

To lead the judge, step-by-step, to the result stated in the application conclusions *before the judge gets to them*, the writer must understand the persuasive power that can come through phrasing and organizing the rules. In a brief, "[e]ffective persuasive writing requires attention to framing and reframing the law . . . ."[59] In proposed conclusions of law, that attention is even more important because the conclusions lack the detailed application of law to facts found in a brief.

---

[58] Edwards, *supra* n. 44, at 305.

[59] Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, *Writing for Law Practice* 223–24 (2d ed., Found. Press 2010).

Application conclusions. These conclusions are as close as proposed conclusions get to allowing synthesized analysis, so they are essential to closing the deal with the judge. But they pose a risk because of lawyers' tendency to treat them like a paragraph in a brief by including extensive and detailed application of law to the facts. Doing that deviates substantially from judicial expectations for this document, thus reminding the skeptical audience that it is reading the work of a paid advocate. Indeed, a key reason why appellate courts disapprove of trial judges' verbatim adoption of proposed findings and conclusions is that too often "they are loaded down with argumentative overdetailed partisan matter."[60]

Instead, application conclusions should concisely apply the subrule conclusions to the most crucial evidentiary findings and relevant ultimate finding in just one or two sentences — like these application conclusions that follow the competency subrule conclusions set out in paragraphs 7–9 above:

> 10. On December 14, 2009, when Jim and Tracy vowed to each other that they would be "lawfully wedded," Jim was still legally married to Diane McAllister. That marriage was an impediment preventing Jim and Tracy from legally marrying.
>
> 11. Diane's death on December 20, 2009, removed the impediment of Jim's first marriage. If Tracy and Jim satisfied the remaining elements of common-law marriage, discussed below, their illegal bigamous marriage would have automatically ripened into a valid legal marriage the moment Diane died, and they did not need to take any additional steps. § 40-1-401(2); *Schanbacher* [citation omitted].

The application conclusions should provide just enough analysis to remind the reader of the critical evidentiary and ultimate

---

[60] *Roberts v. Ross*, 344 F.2d 747, 752 (3d Cir. 1965).

findings of fact and to explain — without sounding like an advocate — how they satisfy the relevant subrules.

In organizing the proposed conclusions, the writer must decide whether to state all the subrule conclusions on an issue before applying any of them, or to apply each subrule immediately after stating it. If the subrules are closely related, the conclusions often flow better if all the subrule conclusions are identified before being applied. Some subrules, however, seem to demand immediate application before other subrules are identified.

Ultimate conclusions. The last type of conclusion is the legal equivalent of ultimate findings of fact. Ultimate conclusions should leave no doubt about how a particular issue is resolved, as if checking it off a list:

> 12. Jim became legally competent to marry Tracy on December 20, 2009. Tracy's competence is not in dispute. Therefore, this element of common-law marriage is satisfied.

A good application conclusion, such as paragraph 11 above, can often be read as an ultimate conclusion, but expressly stating the resolution of each issue is better as long as the phrasing is not repetitious. The ultimate conclusion on the final issue should also either briefly summarize the overall conclusion on the merits or be followed by a summarizing ultimate conclusion that does so. It should also tie up any other legal loose ends. Here is the combined application and ultimate conclusion for the issue of public repute — the final element of common-law marriage — followed by a summarizing conclusion for the entire dispute:

> 33. By acknowledging their marriage publicly and to friends and colleagues, Jim and Tracy began establishing their reputation as a married couple. While their opportunity to fully establish that reputation was cut short by Jim's death, they had done all that the law requires, satisfying the element of public repute.

34. In sum, Tracy has established that her marriage to Jim met all the requirements for a valid common-law marriage. Therefore, as the surviving spouse of a decedent who died intestate, she has priority of appointment as personal representative of his estate. § 72-3-502.

Drafting Tip: Start at the End and Work Backward

The most effective way of drafting proposed findings and conclusions is to begin by drafting the conclusions of law. Because the overall goal is to get the judge to reach the desired legal conclusions, the writer should begin there and work backward toward the factual findings on which the conclusions rest. By the time the writer gets to the evidentiary findings, which are drafted last, the central details on which the resolution depends should be clear. Therefore, draft proposed conclusions and findings in the following order:

(1) Jurisdictional and general conclusions

(2) Ultimate conclusions for each issue

(3) Subrule conclusions for each issue

(4) Application conclusions for each subrule

(5) Jurisdictional, procedural, and background findings

(6) Ultimate findings for each issue

(7) Evidentiary findings for each issue

Of course, as with all writing, drafting proposed findings and conclusions is a recursive process: the writer must revisit portions drafted earlier to revise for clarity and persuasion. One of the last steps should be to double-check the organization, making sure that the findings and conclusions are logically arranged and grouped

under topical issue headings. The findings of fact should be in the following order:

(1) Jurisdictional finding

(2) Procedural findings

(3) Background findings

(4) Evidentiary findings on the first issue

(5) Ultimate finding(s) on the first issue

(6) Repeat steps 4 and 5 for each additional issue

The conclusions of law should be in the following order, with the conclusions on specific issues also grouped under relevant topical headings:

(1) Jurisdictional conclusion

(2) General conclusions

(3) Subrule conclusions for first issue

(4) Application conclusions for first-issue subrules

(5) Ultimate conclusion for first issue

(6) Repeat steps 3 through 5 for each additional issue

(7) Summarizing ultimate conclusion

As pointed out earlier, sometimes the conclusions on an issue flow better if the subrules are applied to the facts immediately. If so, the application conclusion should immediately follow the relevant subrule conclusion.

Conclusion

For hardened gastronomes, the deconstructed meals served at high-end restaurants like Grant Achatz's Alinea in Chicago, Wylie Dufresne's wd~50 in New York City, and especially Ferran Adrià's El Bulli in Spain provide an almost transcendental experience. Anthony Bourdain once compared how a chef feels after dining at El Bulli to how Eric Clapton felt after seeing Jimi Hendrix play guitar for the first time: "You come out thinking 'What do I do now?'"[61] Although not everyone appreciates the idea of deconstruction,[62] few would question the talent and competence of a chef who can take apart something as simple as a toasted bagel, turn it into bagel-flavored ice cream, mold it back into the shape of a bagel, spray-paint it to look like the original item, and end up with something that tastes memorable.[63]

It's at once more mundane and more important to take apart the CRAC paradigm for persuasive brief-writing and then rearrange and rephrase its components into an effective set of proposed findings of fact and conclusions of law. No one ever lost a large sum of money, or freedom, because a chef's creative new recipe did not work out as well as hoped. And, of course, preparing persuasive proposed findings and conclusions does not require the years of training and expertise that successful culinary deconstruction requires of its highest practitioners.

---

[61] Colman Andrews, *Chef Ferran Adrià, The Greatest?* L.A. Times, http://articles.latimes.com/2010/jun/24/food/la-fo-adria-20100624 (June 24, 2010).

[62] *See* Christopher Borrelli, *10 Bad Dining Trends of the Last Decade*, Chi. Trib., http://articles.chicagotribune.com/2009-10-22/entertainment/0910200330_1_trends-food-industry-research-firm-chefs (Oct. 22, 2009).

[63] Ryan Sutton, *WD-50's $140 Menu Wows with Root Beer, Scrambled Egg: Food Buzz*, Bloomberg, http://www.bloomberg.com/news/2010-05-05/wd-50-s-140-menu-wows-with-steak-and-banana-ice-cream-bagel-ryan-sutton.html (May 5, 2010).

But it does require some. Right now, any training that lawyers get in preparing this important document typically occurs, at best, on the job after law school; more likely, the training comes through trial and error when the stakes are high and the pressures great.

That should be rectified by teaching proposed findings and conclusions as part of the required legal-writing program in law school. The exercise benefits students by strengthening their understanding of the interplay of facts and law and their ability to write persuasively. And it benefits the profession by better preparing students for the actual practice of law. The alternative is, in the words of the Carnegie Foundation, to fall back on the long-standing law-school tradition of leaving graduates "to simply figure things out for themselves."[64]

[64] Sullivan et al., *supra* n. 3, at 109.

Appendix

Attorney # _____
Readem & Weep
700 Eddy Avenue
Missoula, MT 59812
(406) 243-5286
Attorney for Petitioner

MONTANA FOURTH JUDICIAL DISTRICT COURT,
COUNTY OF MISSOULA

In the Matter of the Estate of James McAllister, Deceased.	Hon. Ron Bell Dept. No. 5 Probate No. 10-100

PETITIONER'S PROPOSED
FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER

Introduction

This matter was tried on May 10, 2010, before Judge Ron Bell, sitting without a jury. Petitioner Tracy Flick appeared and was represented by Attorney #_____ of the firm Readem & Weep. Objector Stuart McAllister appeared and was represented by Reece Broderick of Witherspoon & Broderick. Having heard the evidence and reviewed any relevant documents submitted by the parties, the Court now makes the following findings and conclusions:

Findings of Fact

Concerning Jurisdiction

1. Decedent James (Jim) McAllister was domiciled in Missoula, Montana, at the time of his death on February 14, 2010.

Procedural History

2. Tracy Flick filed a Petition for Adjudication of Intestacy, Determination of Heirs, and Appointment of Personal Representative on February 17, 2010. In the Petition, Tracy asserted that Jim died intestate and that she was entitled to be appointed personal representative.
3. Tracy asserted her priority as Personal Representative based on her claim that she was Jim's surviving spouse under Montana Code Annotated § 72-3-502 (2009), having purportedly married Jim under the common law on December 14, 2010.
4. Jim's son, Stuart McAllister, filed an Objection to the Petition on March 3, 2010, and petitioned to be appointed personal representative. He disputes the validity of Tracy's alleged marriage to Jim and asserts that he has priority because he is Jim's sole surviving heir.
5. Stuart argued that the common-law marriage between Jim and Tracy was prohibited by § 40-1-401(1)(a) because Jim was still legally married to Stuart's mother, Diane McAllister, at the time. Stuart claimed that Tracy and Jim's alleged marriage did not become valid because they did not mutually consent to marriage after Diane died on December 20, 2009. Stuart alternatively argued that the common-law marriage was invalid because Jim and Tracy did not cohabit uninterrupted after the date of the alleged marriage or establish the reputation of a married couple.
6. Tracy argued that the death of Jim's first wife, Diane, removed the impediment to a lawful common-law marriage between Tracy and Jim. Tracy also argued that, after mutually consenting to marry by exchanging vows, she and Jim cohabited because Jim's

permanent residence remained her house in Missoula, despite his extensive absence for business. Finally, Tracy argued that she and Jim had begun to establish their reputation as a married couple among their friends before his untimely death.

Background

7. Jim and Diane McAllister were married in Boulder, Colorado, on July 17, 1984. Soon after, they separated and never communicated again.
8. Diane had a son, Stuart, on May 24, 1985, and listed Jim McAllister as the father on the birth certificate. She never informed Jim that he had a son.
9. Tracy and Jim met in the fall of 2008, when Jim was a visiting journalism professor and Tracy was a graduate student in one of his classes. They began dating that fall and began living together in June 2009. At a Halloween party in October 2009, Jim and Tracy announced to their friends that they had become engaged.
10. On December 14, 2009, Jim and Tracy exchanged vows to be married under the common law. The next day, Jim left on a tour to promote his new book, but returned to Montana for Christmas and New Year's.
11. On December 20, 2009, Diane McAllister died in Colorado. Shortly before her death, she informed Stuart that Jim was his father.
12. On January 13, 2010, Jim was admitted to a hospital in Boston, Massachusetts, after suffering a gunshot wound to the head during a robbery. He was unconscious when admitted, and he lapsed into a coma.
13. While visiting Jim at the hospital, Tracy met Stuart, who told her about his status as Jim's son and about Jim's previous marriage to Diane. Tracy had not been aware that Jim was previously married or had a son, but she does not dispute that Jim was Stuart's father.

14. On February 14, 2010, Jim briefly regained consciousness, and called out for "Zelda," his nickname for Tracy. He lapsed back into a coma and died a short time later.

Competence to Marry

15. Tracy Flick was 28 and unmarried when she and Jim exchanged vows on December 14, 2009. Jim McAllister was 48 and married to Diane McAllister.
16. Neither Jim nor Diane ever filed for divorce after their separation in 1984.
17. On December 14, 2009, Jim and Tracy discussed common-law marriage, agreed to marry, and exchanged vows with one another in their home.
18. After Diane died in Colorado on December 20, 2009, Jim and Tracy continued to live together as though they were married and did not reaffirm their agreement to marry.

Consent to Marry

19. Jim had asked Tracy to marry him on New Year's Eve 2008. Tracy deferred her acceptance until Halloween 2009, when the couple announced their engagement at a costume party. Because they were in costume as F. Scott and Zelda Fitzgerald, Jim announced that "Zelda" had agreed to marry him and placed a diamond ring on her finger. "Zelda" became a term of endearment between them, and their friends understood the name to refer to Tracy.
20. Before the engagement, Jim had told Dave Novotny, dean of the journalism school, that he wanted to marry Tracy but was concerned that his marriage to Diane might still be valid. Jim said he knew he needed to divorce Diane, but he was reluctant to "open that can of worms." Nevertheless, he told Novotny that the engagement was serious and that he intended to marry Tracy.

21. On December 5, 2009, Jim consulted his attorney, Paul Metzler, about the possibility of marrying Tracy under the common law. Jim had read about a woman who received survivor benefits when her common-law husband died in the World Trade Center attacks.
22. On December 8, Metzler advised Jim that, to be married under the common law in Montana, he and Tracy simply had to agree to marry and then live together as husband and wife.
23. Jim then asked Metzler whether a second marriage is valid if a first marriage had not been dissolved, and whether the second could ever become valid. Metzler did not know and said he would research the issue.
24. On December 14, Metzler left a voicemail message on Jim's phone explaining that under Montana law, a second, bigamous marriage automatically becomes valid if the first marriage ends.
25. On the night of December 14, Jim and Tracy discussed common-law marriage. Jim had a premonition about a forthcoming book tour and wanted to be married before he left. Tracy agreed, and the two exchanged vows to be "lawfully wedded."
26. Jim gave Tracy a new Range Rover titled in both their names. He explained that it was a more "practical" gift than a wedding ring. He also showed her the dedication to "Zelda" in his new book.
27. Jim and Tracy decided to have a formal wedding ceremony on the following Valentine's Day to please Tracy's deceased mother. Despite this, Tracy's friend Michele Falcone testified that Tracy acted as though she were already married.
28. Jim and Tracy intended to enter a common-law marriage when they explicitly exchanged vows to be one another's spouse. Their intent to marry is further shown by Jim's conversations with his lawyer on how to enter a valid common-law marriage, his gift to Tracy of an expensive car titled in both their names, and the dedication to her in his book.

Cohabitation

29. In June 2009, Jim moved into Tracy's house. He and Tracy also maintained a joint checking account to pay shared expenses and bills.
30. Although Jim was on his book tour much of the time from when he and Tracy exchanged vows until his death, Jim was able to return home to Tracy for three days at Christmas and three days at New Year's.
31. Jim began living with Tracy in June 2009 and maintained that residence until his death on February 14, 2010.

Public Repute

32. In an interview in the *New York Times* about his book, Jim explained that the dedication, which read "For Zelda, my soulmate," referred to his "new bride." This same interview later ran in the local newspaper on December 18, 2009, and was read by Michele Falcone and Dave Novotny, who knew "Zelda" referred to Tracy.
33. After reading the interview, Falcone called Tracy to ask about Jim's statement. Tracy confirmed that they had married under the common law. Falcone testified that Tracy seemed excited about the marriage and gave no indication that she doubted its validity. Falcone believed they were married.
34. Novotny also called Tracy to find out if the article was true. Tracy told him that she and Jim had married under the common law before Jim left on his book tour. Novotny testified that Tracy did not doubt the validity of the marriage, although she thought it was "strange." But when he offered to announce the marriage in the journalism school's newsletter, Tracy agreed. The announcement never ran.
35. Jim publicly announced that he was married to Tracy in a newspaper interview published nationally and locally. Tracy affirmed the marriage to their friends and colleagues.

Conclusions of Law

Jurisdiction

1. This Court has jurisdiction over this matter because the decedent, Jim McAllister, was domiciled in Montana at the time of his death. Mont. Code Ann. § 72-3-111 (2009).

In General

2. In cases of intestacy, Montana gives the highest priority for appointment of Personal Representative to the decedent's surviving spouse. § 72-3-502.
3. Montana recognizes common-law marriage as valid. Mont. Code Ann. § 40-1-403.
4. Public policy favors the finding of a valid marriage. *In re Estate of Hunsaker*, 1998 MT 279, ¶ 32, 291 Mont. 412, 968 P.2d 281. The law presumes that a man and woman portraying themselves as husband and wife have entered into a legal marriage, § 26-1-602(30), and this presumption is "one of the strongest known to law," *In re Swanner-Renner*, 2009 MT 26, ¶ 21, 351 Mont. 62, 209 P.3d 328.
5. To prove a common-law marriage, the party asserting it must show the following: (1) the parties were competent to marry; (2) they assumed marriage by mutual consent; and (3) they confirmed their marriage by cohabitation and public repute. *Hunsaker*, ¶ 32.
6. The party asserting the common-law marriage need not prove that all the elements were satisfied instantly, but only that all coexisted at some time. *Swanner-Renner*, ¶ 16.

Competence to Marry

7. A party lacks capacity to consent to a prohibited marriage. § 40-1-402. Montana prohibits marriages entered into before an earlier marriage is dissolved. § 40-1-401(1)(a).

8. Parties to a prohibited marriage who cohabit after the removal of the impediment to their marriage become legally married on the date the impediment is removed. § 40-1-401(2).
9. An unlawful bigamous marriage ripens into a valid marriage when the impediment of the first marriage ends, whether through divorce or the death of the original spouse. *In re Estate of Schanbacher*, 182 Mont. 176, 183, 595 P.2d 1171, 1175 (1979).
10. On December 14, 2009, when Jim and Tracy vowed to each other that they would be "lawfully wedded," Jim was still legally married to Diane McAllister. That marriage was an impediment preventing Jim and Tracy from legally marrying.
11. Diane's death on December 20, 2009, removed the impediment of Jim's first marriage. If Tracy and Jim satisfied the remaining elements of common-law marriage, discussed below, their illegal bigamous marriage would have automatically ripened into a valid legal marriage the moment Diane died, and they did not need to take any additional steps. § 40-1-401(2); *Schanbacher*, 182 Mont. at 183, 595 P.2d at 1175.
12. Jim became legally competent to marry Tracy on December 20, 2009. Tracy's competence is not in dispute. Therefore, this element of common-law marriage is satisfied.

Consent to Marry

13. Consent of both parties to enter into marriage is essential to a lawful marriage.
14. Consent need not be expressed in a particular form and can be expressed through the exchange of vows, *Swanner-Renner*, ¶¶ 7, 22, or implied through conduct, *Hunsaker*, ¶ 34.
15. Knowledge of an impediment by either party does not affect the validity of consent. *Schanbacher*, 182 Mont. at 183, 595 P.2d at 1175.
16. The intent to formalize marriage later does not preclude finding consent. *In re Est. of Murnion*, 212 Mont. 107, 114, 686 P.2d 893, 897 (1984).

17. Jim and Tracy explicitly consented to marriage when they exchanged vows on December 14. They took each other as "lawfully wedded" husband and wife with the intent to establish a common-law marriage. Jim had explained his desire to marry under the common law, and both he and Tracy exchanged vows with the purpose of becoming a married couple.
18. Tracy's consent is established by her own credible testimony. Jim's consent is corroborated by considerable other evidence. Jim sought legal counsel on how to establish a common-law marriage, and after he found out that a common-law marriage would become valid on the death of the former spouse, he immediately asked Tracy to marry him.
19. Jim's consent can also be implied by the expensive vehicle he gave Tracy as a wedding gift, by his dedication of his book to Tracy, and by his statements to a *New York Times* reporter that he had recently married.
20. Jim's knowledge that he was likely still married to Diane did not negate his consent to marry. Nor did Tracy's lack of knowledge of Jim's previous marriage invalidate her consent. *See Schanbacher*, 182 Mont. at 183, 595 P.2d at 1175.
21. Jim and Tracy's plans to have a later formal marriage ceremony on Valentine's Day did not invalidate their consent. *Murnion*, 212 Mont. at 114, 686 P.2d at 897.
22. Tracy has established that she and Jim mutually consented to marry on December 14, 2009, satisfying this element of a common-law marriage.

Cohabitation

23. To establish a common-law marriage, a couple must confirm their marriage by cohabitation. *Hunsaker*, ¶ 32. To cohabit is to live together "under the representation of being married." § 45-2-101(7).
24. Cohabitation cannot be established if the parties do not intend to live together. *In re Vandenhook*, 259 Mont. 201, 205, 855

P.2d 218, 520 (1993). Intent to continue cohabitation can be evidenced by joint ownership of property. *Murnion*, 212 Mont. at 112, 686 P.2d at 896.

25. Extensive absences from home due to business travel do not negate cohabitation. *Schanbacher*, 182 Mont. at 177–78, 595 P.2d at 1172–73.
26. Jim began living with Tracy in June 2009 and continued to do so until his death on February 14, 2010. Nothing suggests they intended to change their living arrangements. After they exchanged vows on December 14, 2009, they lived together under representation of being married by informing the public and their friends that they had married, and by sharing a joint bank account and joint title to a new vehicle.
27. Stuart's argument that the couple did not establish cohabitation because they did not live together "uninterrupted" following their consent is without merit. Jim's absences due to business travel did not interrupt his cohabitation with Tracy.
28. The facts establish that Jim and Tracy established cohabitation, satisfying this element of a common-law marriage.

Repute

29. After they consent to marry, parties must "enter into a course of conduct to establish their repute as man and wife." *Miller v. Townsend Lumber Co.*, 152 Mont. 210, 218, 448 P.2d 148, 152 (1968).
30. A couple establishes repute when they present themselves as married and the public views them as such. *Hunsaker*, ¶ 38. A couple cannot establish repute if the marriage is kept secret. *Vandenhook*, 259 Mont. at 205, 855 P.2d at 520.
31. Because a public reputation as a married couple is created over time, this element cannot be established instantly, but is a continuing factor during a marriage.
32. Jim and Tracy did not keep their marriage secret. Jim announced that he was married in an article that ran in the *New York Times* and in the local paper. Tracy later confirmed the marriage to

Michele Falcone and Dave Novotny. Tracy also responded positively to Novotny's request to post an announcement of their marriage in the journalism school's newsletter, indicating that she wanted the public to know about the marriage.

33. By acknowledging their marriage publicly and to friends and colleagues, Jim and Tracy began establishing their reputation as a married couple. While their opportunity to fully establish that reputation was cut short by Jim's death, they had done all that the law requires, satisfying the element of public repute.

34. In sum, Tracy has established that her marriage to Jim met all the requirements for a valid common-law marriage. Therefore, as the surviving spouse of a decedent who died intestate, she has priority of appointment as personal representative of his estate. § 72-3-502.

Order

1. The Court declares that the common-law marriage between Tracy Flick and the Decedent was lawful as of December 20, 2009.
2. The Court appoints Petitioner Tracy Flick as Personal Representative of the Estate of Jim McAllister. Letters Testamentary must be issued to her.
3. The Estate must pay the Petitioner's costs and attorney's fees, and Stuart McAllister must pay his own costs and attorney's fees.

Dated _____, 2010.

_____

Ron Bell
DISTRICT COURT JUDGE

Respectfully submitted May 3, 2010.

Attorney # _____
Readem & Weep
Attorney for the Petitioner

700 Eddy Avenue
Missoula, MT 59812
(406) 243-5286